

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

In the Matter of)	
)	
Amendment of Section 73 622(b))	MM Docket No. 00-121
Table of Allotments)	RM-9674
Digital Television Broadcast Stations)	
(Kingston, New York))	
)	
WRNN Associates Limited Partnership)	File No. BPCDT-20020130AAQ
)	
For a Construction Permit for)	
Digital Television Broadcast Station)	
WRNN-DT, Kingston, New York)	
To The Commission		

PETITION FOR RECONSIDERATION

1 WKOB Communications, Inc. ("WKOB") hereby petitions for reconsideration of the Commission's Memorandum Opinion and Order ("Review MO&O") in the above-captioned proceeding, FCC 03-209, released September 5, 2003. In the MO&O, the Commission refused to review and reverse the actions of the Media Bureau allotting digital TV Channel 48 to Kingston, New York,¹ and granting a construction permit to WRNN-DT, Kingston, to operate on that channel

2 WKOB recognizes that the issues have been thoroughly argued in this proceeding and that the Commission may decide summarily to deny reconsideration. However, WKOB believes that the Commission violated the Administrative Procedure Act by failing to give

¹ See *Report and Order*, 17 FCC Rcd 1485 (MM Bur. 2002) ("R&O"), *recon. den.*, *Memorandum Opinion and Order*, 17 FCC Rcd 14326 (MM Bur. 2002) ("Recon. MO&O").

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adequate notice of either its intent or its action modifying a policy that was assumed by WKOB to exist when it bid at auction for Channel 48 as an LPTV displacement channel; and the Commission acted arbitrarily and capriciously in taking WKOB's money and then disregarding the fate of WKOB-LP to achieve hypothetical DTV public interest benefits based on an analysis of operating parameters that WRNN-DT never intended to use. WKOB asks the Commission to reconsider carefully the scenario it has created and to realize that the outcome must be changed; and if the Commission does not reach that conclusion, then it should confirm that it made the following holdings, so that there is no question about what has happened if WKOB, which is being starved to death,² can muster the resources to mount an appeal in the U S Court of Appeals for the District of Columbia Circuit

3 As WKOB sees it, the Commission has held as follows:

a The facts that WKOB bid over \$1 million for Channel 48 at auction is irrelevant, because WKOB should have undertaken sufficient due diligence prior to the auction to realize that its expenditure might be for naught and that WKOB-LP might be displaced from Channel 48 with no other recourse but to go dark.³

² WKOB-LP is silent because its licensed channel, Channel 53, is being used by WFUT-DT, and it cannot raise the capital to construct on its displacement Channel 48 because of the cloud cast by this instant proceeding

³ *Recon. MO&O* at fn. 1, *Review MO&O* at par 6 ("Nevertheless, WKOB was well aware of that possibility when it sought to obtain Channel 48. . . "). WKOB assumes that the Commission has no intention of returning WKOB's money, even though WKOB has not been able to use the spectrum it purchased

b The Commission acknowledges that it stated that it would “avoid, where possible, impacting low power stations”;⁴ but it abandoned that policy in 2000-2001,⁵ after the Channel 48 auction. In order for WKOB to be held responsible for taking this change into account in its due diligence, the Commission must be saying that there was sufficient notice of the change at the time of the auction, before the change was announced. The Commission must also be saying that the language in the *Class A* proceeding was sufficiently clear, both before and after the auction, to put the public on notice that a policy change was being made, even though the Commission did not specifically refer to its early policy and expressly state that the policy was being abandoned.

c Public interest determinations in allotment change proceedings, which require a balancing of factors, are made based on hypothetical reference points, regardless of the fact, and even though the Commission knows, that the proponent does not intend to operate at or near the reference point,⁶ and even though the public interest factors may balance differently at the proposed transmitter site.

⁴ *Advanced Television Systems*, 12 FCC Rcd. 14588 (1997), cited in *Review MO&O* at par. 6.

⁵ The policy was supposedly changed in *Establishment of A Class A Service*, 15 FCC Rcd 6355, 6370-71 (2000), *clarified on recon.*, 16 FCC Rcd. 8244 (2001), cited in *R&O* at par. 7, the *Recon MO&O* at par. 6, and the *Review MO&O* at par. 6 and fn. 4. The WKOB-LP Channel 48 construction permit was granted March 28, 2000. The *Class A* Report and Order was released April 4, 2000.

⁶ Even though a rule making proponent may not be required to specify an actual transmitter site, *see Rev MO&O* at par. 4, WRNN-DT did in fact specify, and thus made the Commission aware of, a significantly different site in its application filed January 30, 2002, immediately after the release of the *R&O* and prior to release of the *Recon MO&O*.

d The fact that the overall interference reduction claimed by WRNN-DT was based on only the hypothetical reference point and did not exist at the actual proposed site is irrelevant to the rule making and should be considered only at the application stage.⁷ In any event, the allotment decision was not premised on interference reduction⁸ but was premised on “increased digital service to the public.”⁹ The Commission did not further elaborate on this conclusion, notwithstanding WKOB’s showings in its pleadings that WRNN-DT achieved coverage of more total viewers (assuming that is the meaning of “increased digital service to the public”) only by moving closer to the densely populated and already very heavily served New York City metropolitan area and away from its more sparsely populated and less served community of license -- a questionable result under Section 307(b) of the Communications Act

e. Even at the application stage, a comparison of reductions and increases in interference need not be taken into account as part of the overall public interest equation, as long as the interference is not “prohibited.”¹⁰

f It follows from the above that the Commission believes that its decision was well-founded for public interest reasons going beyond WRNN-DT’s business preference and convenience, and the Commission’s explanation of those reasons was sufficiently clear to support that decision on judicial review.

⁷ *Recon MO&O* at par 5

⁸ *Review MO&O* at par. 4 (“ [t]he channel change was not premised on interference reduction ”)

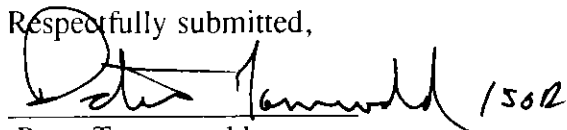
⁹ *R&O* at par 8.

¹⁰ *Recon MO&O* at par 5

4. WKOB again urges the Commission to review its holdings, described above, and to re-evaluate them and to come to the conclusion that the allotment decision cannot stand up on judicial review; or even if the allotment decision can be sustained, the grant of a construction permit with substantially different parameters may not be sustained. If the Commission does not come to that conclusion, then it should affirm that WKOB has correctly described the holdings, so that the issues will be clearly stated should judicial review ensue.

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Respectfully submitted,


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October 6, 2003

CERTIFICATE OF SERVICE

I, Daniella K. Mattioli Knight, hereby certify that on this 6th of October, 2003, I caused a copy of the foregoing "Petition for Reconsideration" to be sent by first-class United States mail, postage prepaid, to the following

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